Supreme Court, U.S.
FILED
NOV 9 2001
CLERK

Nos. 00-1751, 00-1777 & 00-1779

In The

Supreme Court of the United States

SUSAN TAVE ZELMAN, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

And Related Cases

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICI CURIAE* OF JESSE H. CHOPER, *ET AL.* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

Jesse H. Choper is the Earl Warren Professor of Public Law at the University of California, Berkeley. Professor Choper is one of the nation's recognized authorities on the Religion Clauses of the First Amendment.[1] The following law professors join Professor Choper in supporting the constitutionality of the challenged program: Thomas Baker, Drake University; William Bassett, University of San Francisco; Tom Berg, Cumberland School of Law, Samford University; Ashutosh Bhagwat, University of California, Hastings College of Law; Teresa Collett, South Texas College of Law; John Coons, University of California, Berkeley; Reverend John Coughlin, St. John's University; Brannon Denning, Southern Illinois University; John DiPippa, University of Arkansas, Little Rock; John Eastman, Chapman University; Allen Ferrell, Harvard University; David Forte, Cleveland Marshall College of Law; Richard Garnett, University of Notre Dame; Frederick Gedicks, Brigham Young University; Mary Ann Glendon, Harvard University; Lino Graglia, University of Texas; Michael Heise, Case Western Reserve University; Gail Heriot, University of San Diego; Roderick Hills, University of Michigan; Scott Idleman, Marquette University; Donald P. Kommers, University of Notre Dame; Grant Nelson, University of California, Los Angeles; Michael Perry, Wake Forest University; David Post, Temple University; Charles

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[1] Counsel for the parties did not author this brief in whole or in part. The American Education Reform Council, which is not a party to the case, provided a contribution towards the preparation and submission of this brief.

Rice, University of Notre Dame; Rosemary Salomone, St. John's University; Bernard Siegan, University of San Diego; Gregory Sisk, Drake University; Steve Smith, University of Notre Dame; Andrew Spiropoulis, Oklahoma City University; Harry Tepker, University of Oklahoma; Eugene Volokh, University of California, Los Angeles; Richard Wilkins, Brigham Young University; John Witte, Emory Law School. The law professors joining in this brief may not subscribe in all particulars to each of the arguments set forth; but all agree that under the Court's Establishment Clause jurisprudence, the challenged program is constitutional.

STATEMENT OF THE CASE

The Pilot Project Scholarship Program, Ohio Rev. Code §§ 3313.974-3313.979, provides funding for parents to send their children to "alternative schools" in districts that "are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent." Ohio Rev. Code § 3313.975(A). This unusual criterion only applies to one district, the Cleveland City School District (CCSD), and can only be understood in the context of its troubled history.

In 1973, many African-American parents filed an anti-discrimination lawsuit against CCSD. *See Reed v. Rhodes*, 1 F. Supp. 2d 705, 709 (N.D. Ohio 1998). In 1978, the Federal District Court for the Northern District of Ohio found over 200 specific constitutional violations by CCSD. *Reed v. Rhodes*, 455 F. Supp. 546, 552 (N.D. Ohio

1978). The problems that have plagued CCSD were not limited to a failure to follow desegregation orders, but also included abysmal retention rates, dismal academic performance, and a frightful safety record.

This litigation has continued into the 1990s as have CCSD's many troubles. By 1995, the court described CCSD as a system in "total fiscal and administrative collapse." *Reed v. Rhodes*, 934 F. Supp. 1459, 1464 (N.D. Ohio 1996 (quoting its order of March 3, 1995)). CCSD's budget between 1992 and 1995 soared while its academic performance plummeted.[2] Absentee rates, dropout rates, and non-promotion rates all rose as test scores fell to the lowest level in the state.[3] CCSD itself could no longer meet payroll, despite its increased budget. It failed to account for a $40 million advance loaned to it by the state in 1994-95.[4] The court found that CCSD had "no credit rating . . . no credibility . . . was without educational, fiscal and administrative direction . . . [and] was without an available, viable contingency plan designed to confront and correct its cascading catastrophic predicament." *Reed v. Rhodes*, 934 F. Supp. at 1464. As a consequence, the court transferred control of the district to the Ohio State Superintendent for Education. *Reed v. Rhodes*, slip op., No. 1:73 CV 1300 (N.D. Ohio, Mar. 3, 1995).

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[2] CCSD's indebtedness rose from $35 million in 1992 to $140 million in 1995. CCSD overspent its $500 million budget by $70 million in 1995. *Reed v. Rhodes*, 934 F. Supp. at 1461 n. 1.

[3] By the close of the 1994 school year, the student absentee rate in grades 9-12 increased to 29%; the dropout rate rose to 35%; the non-promotion rate was 42% in 1994 and rose to 61% in 1995. *Reed v. Rhodes*, 934 F. Supp. at 1461 n. 1.

[4] *Reed v. Rhodes*, 934 F. Supp. at 1464.

During the course of the litigation, the court urged the state "to think about innovative programs and undertakings. . . . " *Reed v. Rhodes*, 869 F. Supp. 1274, 1277 (N.D. Ohio 1994). The scholarship program was enacted in this context to help remedy the complete collapse of the education system in the state's largest city.[5] Providing alternatives to parents is the sole reason for the program. It particularly enables low income parents to remove their children from the failed Cleveland public schools and send them to "alternative schools" or, if the parents choose to have their children remain in a CCSD public school, it authorizes funds for extra tutoring. Ohio Rev. Code § 3313.975(A).

An alternative school is defined as "a registered private school located in a [scholarship program] school district or a public school located in an adjacent school district." Ohio Rev. Code § 3313.974(G). If parents choose to send their child to a private school, the program will provide a grant for 90 percent of tuition up to $2,500 (making $2,250 the maximum scholarship) per eligible child for low income families, and 75 percent of tuition per child for other families (making $1,875 the maximum scholarship for such families).[6] If parents choose to send their child to a public school in an adjacent district, the program will provide that public school with $2,250 (the

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[5] Additional remedies include the Community School Program. Ohio Rev. Code § 3314.01 *et seq*. This program has been enlarged to include Pilot Project Scholarship Program districts and districts in addition to Cleveland that are in a state of academic emergency. Ohio Rev. Code § 3314.02(A)(3).

[6] Ohio Rev. Code § 3313.976(8) and Ohio Rev. Code § 3313.978(C)(1).

maximum scholarship amount) in addition to the base per pupil cost funded by the state (approximately $4,334 for Cuyahoga County, where CCSD is located), Ohio Rev. Code § 3317.012(A), for a total of $6,584. Despite this financial incentive, no public school in an adjacent district has chosen to participate in the program.

In the 1999-2000 academic year, 56 private schools in the Cleveland district (46 of which are religious) participated in the program. The parents of 96 percent of the students receiving a scholarship from this program chose to have their child attend a religious school. The overwhelming majority of children who participate in the program are members of underrepresented minority racial groups,[7] and are from single parent, low income families.[8] This year alone, the scholarship program is providing 4,000 students who live in CCSD with new opportunity to realize their potential by attending a more

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[7] Approximately 73.4% of students in 1999 were minorities: approximately 57.4% African American; 6.1% Hispanic; 3.8% Multi-Racial; 2.8% Other. Gen. Accounting Office. GAO 01-914 (August, 2001) *Publicly Funded Voucher Programs*, at 17.

[8] 70% of students in 1999 were from single parent low income families. Overall, 78% of the students participating are from low income families. Jay Greene, *A Survey of Results from Voucher Experiments*, Harvard University (2000).

68.7% of the mothers of scholarship students were African American compared to 45.9% in the CCSD public school population. 4.2% of the mothers were Hispanic and 2.2% were Asian compared to 8.0% Hispanic and 0.9% Asian in the public school population. Jay Greene, *An Evaluation of the Cleveland Voucher Program After Two Years*, Harvard University (1999) Table 1.

promising new school (or getting tutoring at their existing school).

SUMMARY OF THE ARGUMENT

The scholarship program satisfies the major criteria that this Court has articulated in recent years to test potential Establishment Clause violations. Neither its "purpose" nor its "effect" is to advance religion. Its eligibility criteria are religiously neutral. Parents have the opportunity to choose from a variety of schools, public and private, sectarian and non-sectarian. The public schools within the program's available choices include those in Cleveland's suburbs, which were provided a significant financial incentive to participate. Their decision not to do so, for their own reasons and against their own financial interests, should certainly not be used to diminish the breadth of the program's facial neutrality in respect to the number of options afforded to Cleveland parents. Regardless of the decision by public schools in adjacent districts, parents still have a wide array of choices. If parents select a religious school, they may choose from a diverse group including Roman Catholic, Islamic, and those of various Protestant denominations.

Since the dollar amount of the benefit does not change based on the school that parents select, the state provides no financial incentive for parents to choose a particular private school. Since the program makes the grants payable only to parents and not to schools, Ohio Rev. Code § 3313.979, a school can benefit under the

program only after the parents have independently chosen the school for their child.

All of the factors stated above should cause a reasonable observer, familiar with the history of the Cleveland public schools, to perceive the state scholarship program (which includes the new opportunity to attend private schools within the district and suburban public schools outside it) not as an endorsement of religion, but rather as an effort to ensure that all children who live in Ohio receive an adequate education.

Finally, since the maximum scholarship available under the program is markedly less than half of the state's cost to educate each student in Ohio's public schools, there is a strong assurance that the state benefit will not support the religious mission of any recipient school, result in government inculcation of religious beliefs, or directly fund core religious activities.

ARGUMENT

I. ALTHOUGH NO SINGLE TEST HAS BEEN EXPLICITLY ADOPTED TO EVALUATE WHETHER A GOVERNMENT PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE, THE COURT HAS BEEN GUIDED BY TWO GENERAL THEMES WHICH, IN TURN, HAVE BEEN INFLUENCED BY A SERIES OF SPECIFIC FACTORS.

The Court's opinions over the last fifteen years have suggested, but not explicitly adopted, a standard for judging Establishment Clause issues to replace the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602

(1971). Two somewhat overlapping themes have recently garnered substantial support, both of which have drawn on the *Lemon* test by continuing "to ask whether the government acted with the purpose of advancing or inhibiting religion, and . . . likewise . . . whether the aid has the 'effect' of advancing or inhibiting religion." *Agostini v. Felton*, 521 U.S. 203, 223 (1997).

The first theme, put forward by the prevailing plurality (Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy) in *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court's most recent ruling on the issue of aid to religious schools, emphasizes "the principle of neutrality." This principle was directly applied to the issue in the instant case by the *Mitchell* plurality's statement that "if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose." *Id.* at 810.

The second theme, the "endorsement" test, initially developed by Justice O'Connor and invoked a number of times in opinions of the Court, finds an Establishment Clause violation when government "endorses religion," which occurs when government makes a "statement that religion or a particular religious belief is favored or preferred,"[9] or when a reasonably informed observer would conclude that official activity "sends a message to nonadherents that they are outsiders, not full members of the

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[9] *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1995).

political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[10] At varying times, the endorsement test has been approved by Justice Stevens,[11] Justice Souter,[12] Justice Ginsburg,[13] and Justice Breyer.[14]

In applying these general themes, the Court has also enumerated a series of specific factors to analyze the constitutionality of government action under the Establishment Clause. The sections below will discuss these factors – who chooses where government aid is put to use, and whether government itself inculcates religious beliefs or directly funds core religious activities – in addition to the "endorsement" and "neutrality" themes and *Lemon's* "purpose" and "effect" criteria upon which both themes draw.

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[10] *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). More extensive elaboration and application of the endorsement test, may be found in Justice O'Connor's concurring opinions in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 772-95 (1995); *County of Allegheny v. ACLU*, 492 U.S. 573, 623-37 (1989); and *Wallace v. Jaffree*, 472 U.S. 38, 67-79 (1985).

[11] *Wallace, supra* note 10; *Lee v. Weisman*, 505 U.S. 577 (1992); *Capitol Square, supra* note 10.

[12] *Lee, supra* note 10; *Capitol Square, supra* note 10.

[13] *Capitol Square, supra* note 10.

[14] *Capitol Square, supra* note 10; *Mitchell v. Helms*, 530 U.S. 793 (2000).

II. THE PURPOSE OF THE SCHOLARSHIP PROGRAM IS SECULAR AND ITS EFFECT IS NOT TO ADVANCE RELIGION

In an important, early exposition of the endorsement test, Justice O'Connor explained in *Wallace v. Jaffree*, 472 U.S. 38 (1985):

> The endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect. In this country, . . . it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.

Wallace at 69-70 (O'Connor, J., concurring). Similarly, in *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court reasoned that "if there is to be assurance that the Establishment Clause retains its force in guarding against those governmental actions it was intended to prohibit, [the Court] must in each case inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation." *Id.* at 838-839.

The secular purpose of the scholarship program in this case is compelling. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court held "[t]he State has . . . a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them." *Id.* at 395 (quoting *Wolman v. Walter*, 433 U.S. at 262 (Powell, J., concurring)). The Cleveland public schools were failing their students, and the program was enacted not to provide financial relief for existing private religious or nonsectarian schools, but to remedy CCSD's abysmal record by expanding educational opportunities for the students who were the victims of this record. Further, as will be discussed in the sections that follow, the practical details of the program's operation demonstrate that its "effect" – as that term has been understood in this Court's recent rulings – does not advance religion.

III. THE PROGRAM'S ELIGIBILITY REQUIREMENTS ARE NEUTRAL

Although a majority of the Court has not found that a program's neutrality is determinative of its validity, the Court has agreed that neutrality is a prime criterion in determining whether a government aid program's effect is to advance or endorse religion. "A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. . . . [T]he guarantee of neutrality is respected, not offended, when the government, following evenhanded policies, extends benefits to recipients whose ideologies and viewpoints,

including religious ones, are broad and diverse." *Rosenberger* at 839. "We have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated benefit." *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 8 (1993). "[T]he mere circumstance that [an aid recipient] has chosen to use neutrally available state aid to help pay for [a] religious education [does not] confer any message of state endorsement of religion." *Agostini*, 521 U.S. at 235, quoting *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488-89 (1986). In *Mitchell v. Helms*, 530 U.S. at 838 (O'Connor, J., concurring), Justice O'Connor, joined by Justice Breyer, concurred in the result, stating that "neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges. Our cases have described neutrality in precisely this manner, and we have emphasized a program's neutrality repeatedly in our decisions approving various forms of school aid." Justice Powell wrote in *Witters*, 474 U.S. at 490-91 (Powell, J., concurring), that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of *Lemon v. Kurtzman*, because any aid to religion results from the private decisions of beneficiaries." See also *id.* at 493 (O'Connor, J., concurring).

The scholarship program plainly satisfies the neutrality criterion. It applies to all parents who live in the district. Students in all Cleveland schools may participate and the only preference is for children of low income

families[15] – a religiously neutral criterion that furthers the program's secular purpose of providing expanded opportunities for students in the inner city public schools who generally are financially unable to move to the suburbs or attend private schools. Students may use scholarship program funding to receive additional tutoring in Cleveland public schools. Students who choose to attend private schools may use their scholarships at any participating private school in the district. Students who wish to attend a public school in adjacent districts bring a financial bonus for the school – the scholarship – in addition to the formula amount.

Schools that participate in the program cannot discriminate on the basis of "race, religion, or ethnic background" in respect to admission of scholarship students, Ohio Rev. Code § 3313.976(4), nor "teach hatred of any person or group," Ohio Rev. Code § 3313.976(6). They must also agree not to require low-income scholarship recipients to pay more than 10 percent of tuition up to a maximum of $250, thus making this new opportunity meaningful for low-income students. The schools' eligibility to participate in the program is based on secular criteria (for example their geographic location, their willingness to comply with certain health and safety standards, etc.). None of these criteria concern religion except to guarantee that religion is not a factor in the selection of

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[15] Ohio Rev. Code § 3313.977(A)(1)(c) gives children from low income families a preference in the selection process for the scholarship program.

scholarship students. Islamic, Protestant, Roman Catholic, and purely secular schools all participate, thus representing the diversity of the community.

In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court upheld a program that included religious groups in the organizations to which aid was distributed. The program defined a potential recipient as a "public or nonprofit private organization or agency which demonstrates the capability of providing the requisite services." *Id.* at 608 (citations omitted). The Court found "a fairly wide spectrum of organizations [was] eligible to apply for and receive funding under the Act, and nothing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution." *Id.* at 608.

IV. THE INDEPENDENT CHOICES OF PARENTS DETERMINE WHERE THE SCHOLARSHIP WILL BE USED.

Another highly important factor, recognized by the Court in a series of decisions involving programs that resulted in government aid being used in religious schools, concerns the identity of the recipients. As stated by Justice O'Connor, joined by Justice Breyer, concurring in *Mitchell v. Helms*, when the aid is "provided directly to the individual student [or parent] who, in turn, ma[kes] the choice of where to put that aid to use," it is "less like a direct subsidy, which would be impermissible under the Establishment Clause, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution. . . . Any money that ultimately went to religious institutions did

so only as a result of the genuinely independent and private choices of aid recipients." *Mitchell* at 841 (citations omitted).

In *Mueller v. Allen*, the Court upheld a tax deduction available to all parents whose children incurred certain educational expenses regardless of whether the child attended a public school, a private secular school, or a private religious school. The Court held that "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject. . . . Under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children." *Id.*, 463 U.S. at 399.

In *Witters*, beneficiaries of a vocational retraining program could use their aid to train for a religious profession at a religious institution. The Court held that "the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." *Id.* at 487. As Justice White wrote in his concurrence, "[s]tate programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* test, because any aid to religion results from the private choices of individual beneficiaries." *Id.* at 490-91 (White, J., concurring).

In *Zobrest*, the Court upheld a program that allowed a state-paid sign language interpreter to translate for a hearing-impaired child in the school of the child's choice:

> By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the . . . [program] creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking.

Id. at 10.

Under the scholarship program in this case, the parents and not the state determine where the benefit will be applied. The program does not provide a financial incentive that could influence parents' decisions to send their children to a religious school. (In fact, there is a financial disincentive to send children to a private school, religious or nonsectarian: parents who send their child to any private school are responsible for at least 10 percent of tuition and are not eligible for tutoring grants.) Further, there is no financial incentive for private schools to seek students based on religious criteria. All students bring an equal benefit with them to attend the private school of their family's choice. Public schools in adjacent districts do have a special financial incentive to participate, unlike private schools in the Cleveland district, but this incentive is not based on religious status.

V. THE PERCENTAGE OF PARENTS WHO CHOOSE TO SEND THEIR CHILD TO A RELIGIOUS SCHOOL IS NOT CONSTITUTIONALLY SIGNIFICANT.

In *Agostini*, 521 U.S. at 229, the Court held:

> [The Court is not] willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. *Zobrest* did not turn on the fact that James Zobrest, at the time of litigation, had been the only child using a publicly funded sign-language instructor to attend a parochial school.

In upholding the program in *Mueller*, 463 U.S. at 401, where about 95 percent of the participating children were alleged to have attended religious schools, the Court held "[w]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." It should be noted that in this case, the percentage of students attending private schools is affected not only by parents' independent choices, but also by the decisions of suburban public schools that chose not to participate despite favorable financial incentives. Third parties' choices should not determine the constitutionality of this program and penalize families who seek better education for their children. These parents chose from options then available, and no doubt many hope that over time, as new schools arise and perhaps public suburban schools begin to participate, even more options will become open to them.

VI. THE PROGRAM DOES NOT HAVE THE IMPERMISSIBLE EFFECT OF INCULCATING RELIGIOUS BELIEFS.

The Court has "repeatedly recognized" that "government inculcation of religious beliefs has the impermissible effect of advancing religion." *Agostini*, 521 U.S. at 223. But the Court has also made clear that when government aid is not provided directly to the schools but is "disbursed directly to students, who then use the money to pay for tuition at the educational institution of their choice," then the aid "will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination." *Id.* at 226. Further, the Court has noted that

> the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling the Court to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. . . . This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.

Id. at 230-32.

This is precisely the situation in the scholarship program in this case where the aid is provided directly to parents based on neutral criteria for use at a school based on the parents' choice. These Cleveland parents made

several choices. Many continued to keep their children in the Cleveland public schools where they were promised extra tutoring. Some selected private non-religious schools. In all likelihood, some would have preferred to send their children to public schools in the suburbs, but that option was foreclosed by their nonparticipation. Other parents chose religious schools. Some of those parents, no doubt, did so because they valued religious education, others because they felt that the education in those schools was better for their children even though they followed a different faith.[16]

VII. A REASONABLE OBSERVER WILL NOT PERCEIVE THE PROGRAM TO BE STATE ENDORSEMENT OF RELIGION.

In *Mitchell v. Helms*, Justice O'Connor, joined by Justice Breyer, also examined the relationship of "true private choice" in the context of an endorsement analysis. In contrasting the program in *Mitchell* to those in *Witters* and *Zobrest*, Justice O'Connor wrote:

> In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same

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[16] In 1999, the religious affiliation of mothers who had children participating in the program was as follows: 43.4% Baptist; 10.3% other Protestant; 18.9% Roman Catholic; 13.7% other religion; and 12.1% no religious affiliation. Jay Greene, *An Evaluation of the Cleveland Voucher Program After Two Years*, Harvard University (1999) Table 1.

> religious schools. . . . [W]hen government aid supports a school's religious mission only because of independent choices made by numerous private individuals to guide their secular aid to that school, no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief. . . . Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.

Id. at 842-43 (citations omitted) (O'Connor, J., concurring).

As is evident from all that has been said, the program in this case falls into the category just described. Students who attend a religious school cannot send a message that "they are insiders" or "favored members of the community." Rather, the only message is that they do not cease to be equal members of the community by choosing one school – public or private – from among the many that participate in the program.

Moreover, it would seem extremely unlikely that a reasonably informed observer – especially one "aware of the history and context of the community," *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring), and of Ohio's effort to provide improved educational opportunities to children whose local public schools have failed them – would conclude that the scholarship program was meant to endorse religion. That a participating religious school is forbidden from preferring scholarship program students of its own faith only adds to this perception of nonendorsement.

VIII. SINCE THE SCHOLARSHIP PROGRAM COSTS THE STATE SUBSTANTIALLY LESS THAN TO SEND STUDENTS TO PUBLIC SCHOOLS, THE STATE RECEIVES FULL SECULAR VALUE FOR ITS EXPENDITURE, AND IT DOES NOT SUPPORT THE RELIGIOUS MISSION OF RECIPIENT SCHOOLS.

The exact sum the state spends for each child's public school education is difficult to ascertain. At present, Ohio allocates a specific amount to every public school, for every pupil enrolled in the school. This funding amount, called the "base formula amount," Ohio Rev. Code § 3317.02,[17] was $4,294 for the 2001 fiscal year. Ohio Rev. Code § 3317.02(B). The formula amount is multiplied by a "cost of doing business formula" for each locality in Ohio. Ohio Rev. Code § 3317.02(N).[18]

As the name implies, the "base formula amount" does not represent the total per student expenditure by the state. In addition, Ohio allocates funds for building repairs, summer school remedial programs, various incentives to lower class sizes, and other programs too numerous to list here, *see* Ohio Rev. Code Chapter 3317. Consequently, the Ohio Supreme Court has stated that "the formula amount has no real relation to what it

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[17] Rather than change the appropriation as each child enters or exits school, the state uses an "average daily membership" formula to determine the number of students attending a particular school. Ohio Rev. Code § 3317.02(D)(1). The number of students in a school's average daily membership is multiplied by the per student "base formula amount."

[18] For Cuyahoga County this formula is 1.0697.

actually costs to educate a pupil." *DeRolph v. State of Ohio*, 677 N.E.2d 733, 738 (Ohio 1997).

What is central to this case is that because Ohio pays a maximum of $2,250 to educate each student who participates in the scholarship program – an amount just slightly more than half of the base formula amount – it is fair to conclude that the scholarship program enables the state to finance a child's education for markedly less than half of the state's per capita public education cost.

In the most recent decisions of this Court involving the issue of government aid to religious schools, Justice O'Connor recognized that the Court has "departed from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid," *Agostini*, 521 U.S. at 225, but also expressed the Court's concern "that secular government aid not be diverted to the advancement of religion," *Mitchell v. Helms*, 530 U.S. at 840, or to "government inculcation of religious beliefs," *Agostini*, 521 U.S. at 223. In addressing this latter concern in *Mitchell*, Justice O'Connor, joined by Justice Breyer, urged that

> To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes. . . . In *Agostini*, we repeatedly emphasized that . . . plaintiffs raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination.

Id. at 857-58.

Although the Court has not developed the scope of plaintiffs' burden of proof in any detail, it is sensible to assume that as long as the state's scholarship is significantly less than what the state pays to educate students in public schools, the private school is not being paid more than the value of the secular services it renders. Like the transaction in *Witters*, which was characterized as a paycheck, the transaction of a state procuring an education for one of its residents through a private contractor is no different than other purchases by the state.

A prime criterion on which such a transaction should be evaluated is the value the state is receiving for its expenditure. Here, the benefit is an education for a child. In fact, the state is using far fewer tax dollars to pay for an education through the scholarship program than would be used to pay for a child's education at a public school. Under these circumstances, there is strong assurance that the scholarship program will not support the religious mission of any recipient school or result in government indoctrination of religion.

CONCLUSION

The Cleveland scholarship program would not be perceived by a reasonable observer to constitute an endorsement of religion. Neither its "purpose" nor "effect," as these terms are explained in this Court's recent decisions, is to advance religion. The program's criteria for recipients are neutral in respect to religion

(except to prohibit participating schools from discriminating on the basis of "race, religion, or ethnic background"). Its only preference is for children of low income families seeking improved education for their children who badly need it. The scholarship is provided to the parents, not directly to schools. Although a high percentage have chosen to have their children attend private religious schools, rather than to have them receive additional tutoring in Cleveland public schools or to attend a private nonsectarian school, this was the product of their genuinely independent and private choice, a result likely accentuated by the refusal of public schools in districts adjacent to Cleveland to participate in the program. The state provides no incentive for parents to choose a particular type of school. Finally, the fact that the scholarship program costs the state markedly less than half the amount it spends for public education strongly assures that (1) public funds will "not be diverted [either] to the advancement of religion," *Mitchell v. Helms* at 840 (O'Connor, J., concurring), or to "government inculcation of religious beliefs," *Agostini* at 223, and that (2) the state will not provide "direct funding of core religious activities," *Rosenberger* at 863 (Souter, J., dissenting).

We therefore urge the Court to affirm the constitutionality of the program.

Respectfully submitted,

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